From: "Zell, Christopher" <zell.christopher@epa.gov>

To: "Croxton, David" <Croxton.David@epa.gov>

Date: 10/27/2017 2:08:12 PM

Subject: FW: Deschutes TMDL Paper

Attachments: Deschutes TMDL NOI Briefing_draft_10232017_v2_JC.docx

FYI

From: Curtin, James

Sent: Friday, October 27, 2017 1:38 PM To: Brown, Leah; Zell, Christopher

Cc: Arrigoni, Holly; Havard, James; Lewicki, Chris

Subject: Deschutes TMDL Paper

Hi Leah and Chris,

Attached are my (hopefully not too repetitive) comments. They should be fairly self-explanatory.



I'm happy to discuss my comments and the paper in greater detail on Monday

Jim

Jim Curtin
USEPA Office of General Counsel
Water Law Office
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Region 10 Briefing Paper for the Office of the Regional Administrator

MEETING/EVENT TITLE:

"Deschutes TMDL Notice of Intent from Northwest Environmental Advocates – How to Respond"

MEETING DATE: 11/7/2017 10:00 am - 10:45 am

LOCATION: Dan's Office

CONFERENCE CALL LINE: (b) (6)

PREPARED BY: Chris Zell and Leah Brown

DATE: 10/19/2017

INVITED EPA ATTENDEES: Dan Opalski; Jim Havard; Jim Curtin; Holly Arrigoni; Chris Lewicki; Dave Croxton;

Laurie Mann; Leah Brown; Jennifer Byrne; Cara Steiner-Riley; and Chris Zell[HA1]

I. REQUESTING OFFICE

Office of Water and Watersheds / Watershed Unit

II. TIMING

III. PURPOSE

• FOIA exemption (b)(5)

IV. BACKGROUND/HISTORY

The Deschutes River, Percival Creek, and Budd Inlet Tributaries (Phase 1) TMDL study area (186 mi²) is located in south Puget Sound and is situated within the boundaries of Thurston and Lewis Counties, Washington. The study area includes the major cities or towns of Olympia, Lacey, Tumwater, and Rainier. -During early stages of TMDL development (~2005-2014), Ecology planned to submit a TMDL addressing impairments in containing both

freshwater (Deschutes) and marine (Budd Inlet) water quality limited segments. However, dDue to the political challenges of removing [HA4]Capitol Lake (a primary low dissolved oxygen contributor to Budd Inlet), Ecology decided to split the TMDL into freshwater and marine segments. Ecology submitted the freshwater (Phase 1) Deschutes TMDL to EPA for approval on December 17, 2015. Marine segments (Phase 2, Budd Inlet) are planned for completion in 2020.

The submitted 2015 TMDL package included a request that EPA approve allocations for 73 Water Quality Limited Segments (WQLSs) impaired by five pollutants (temperature, dissolved oxygen [DO], pH, fecal coliform, and fine sediment). Beginning in February 2016, EPA has discussed withand Ecology have discussed opportunities to remedy legal and technical shortcomings of the TMDL that have been identified by both EPA (WU, ORC) and potential plaintiffs (NWEA, Squaxin Island Tribe). Such TMDLThese shortcomings or issues are provided as Appendix A to this briefing paper.



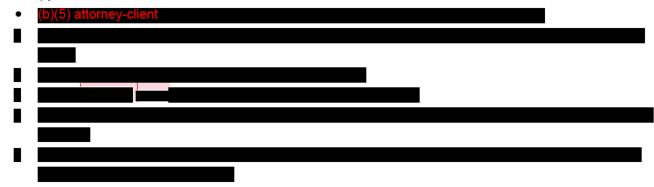
Deschutes (WA) TMDL Key Dates

Dates	Event	
2004	Sampling Plan Completed	
2003 - 2007	Monitoring	
2007 - 2014	TMDL Development	
April 2014	Announcement to Submit Freshwater Components Only	
December 2015	Ecology Submitted TMDL to EPA	
February - October 2016	EPA Concerns Shared with Ecology	
June 2016	Ecology Hosted Squaxin Island Tribe – Tribal Coordination	
	Meeting	
August 2016	EPA/Ecology Discussion with NWEA in Portland, OR	
September 2016	EPA Request Ecology to Withdraw TMDL	
January 2017	EPA Received Puget Sound FOIA from NWEA	
March 2017	EPA Developed Bacteria TMDLs	
June 2017	EPA & Ecology Negotiate "Resubmit" Letter	
July 2017	EPA Received Resubmit Letter from Ecology	

August 2017	Region 10 Shared Draft Approval Letter with HQ
August 2017 EPA Received Deschutes NOI from NWEA	
October 5, 2017	EPA Further Discussed TMDL Withdrawal with Ecology
October 13, 2017	EPA Region 10 Discussion with NWEA, re: NOI

V. KEY ISSUES

Appendix A <u>identifies and discusses</u> itemizes EPA and NWEA concerns related to the Deschutes TMDL. In addition, please note these observations:

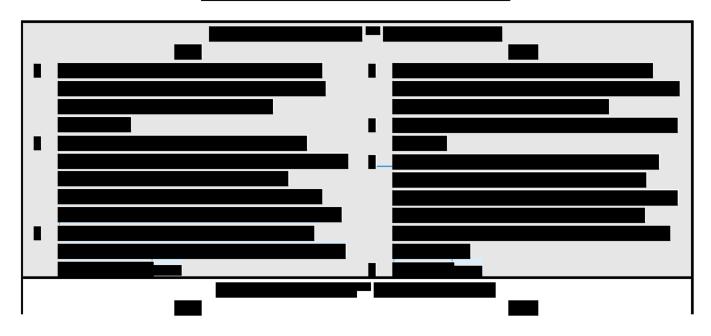


VI. ADDITIONAL POLICY AND LEGAL INFORMATION

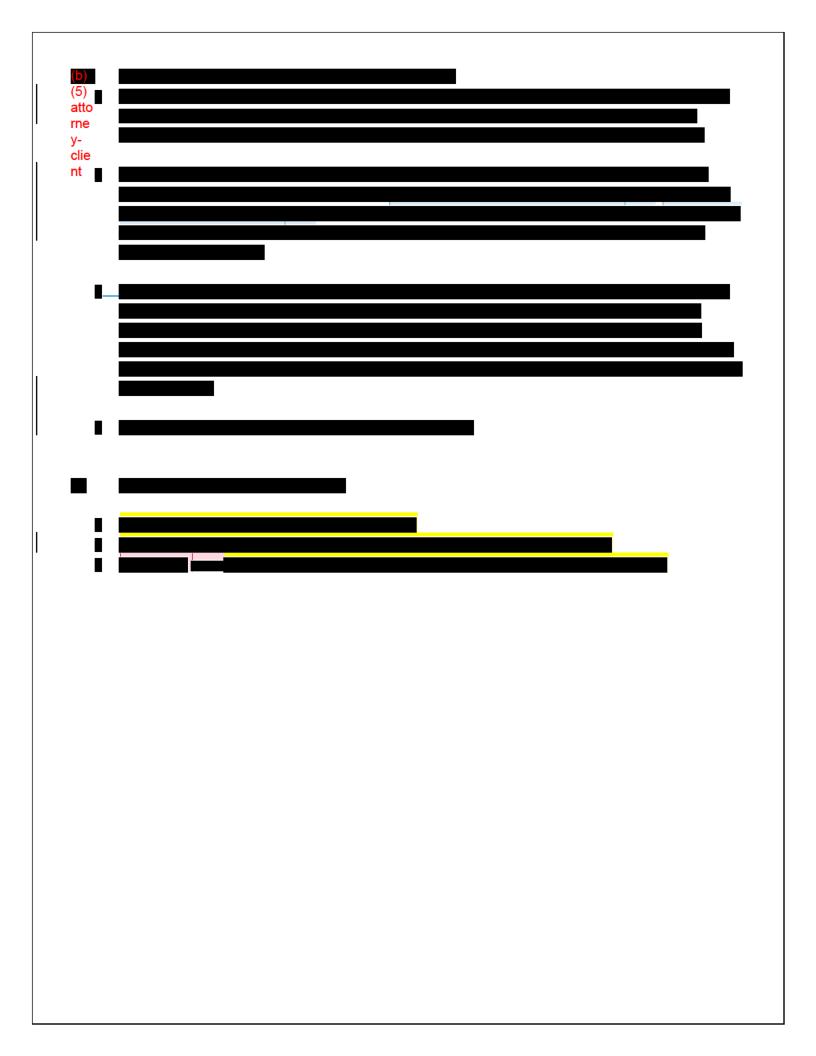
Section 303(d)(2) of the CWA requires EPA to "either approve or disapprove [a TMDL] not later than thirty days after the date of submission." If EPA disapproves a TMDL, Section 303(d)(2) requires EPA to issue a substitute TMDL within 30 days of disapproval. Ecology submitted the Deschutes River TMDL in December 2015, and EPA



(b)(5) attorney-client



	(b)(5) attorney-client



FOIA exemption (b)(5)		

APPENDIX A - NWEA Concerns

Ecology scheduled a meeting with Nina Bell on August 2, 2016 at the OR Ops office in Portland, OR_[HA30] (at OR Ops office) to obtain NWEA feedback on the Deschutes TMDL as she had indicated unspecified concerns with the TMDL in previous discussions. Laurie Mann and Chris Zell participated in the meeting at the request of Ecology. Overall, Nina expressed an unfavorable opinion of the TMDL and said summarized that the TMDL will not change or improve existing conditions. Nina did offer a potential carve-out from the NCC remand [CJ31] for temperature segments of the Deschutes if buffer requirements were more detailed and were placed into the load capacity/allocation section of the TMDL. Nina said explained the DO segments (and maybe pH by reference) of the TMDL were too problematic/flawed and should not move forward. (no 'carve out').

	NWEA		Ecology	EPA
(1)	Unconvinced that TMDL will change existing water quality conditions. [HA32] Downstream waters not protected (self-stated). Failing to protect DS waters is a big deal. TMDL is kind of a shell because it does not deal with DS	(1)	An approved TMDL may help in retiring water rights and obtaining grant funds. An approved TMDL may help bring government partners to the table such as Thurston County and get conservation districts to work together.	We primarily listened and took notes. Chris asked Nina to elaborate on Columbia dioxin TMDL and checkpoint approach.
(3)	waters or tributaries. Buffers show up in implementation rather than allocation section.	(2)	Acknowledged the TMDL has some deficiencies and is working with EPA on some issues. Benefits of TMDL are	
(4)	Need to convert shade values into real, implementable surrogates. How was 75 ft. buffer determined? Vertical and areal density is important. What is mature vegetation? The entire TMDL seems to be a surrogate. Suite of shade surrogates	(3)	relatively minor. TMDL was split because of the contentious nature of Capital Lake and Budd Inlet. Data would become outdated if Ecology waited to do all waters at once. Evidence is pointing primarily to shade and buffers for the	
	may be needed. Why was channel width not allocated as it was part of NCC demonstration.	(4)	primarily to shade and buffers for the Deschutes. Any buffers that Ecology pays for would have to meet NMFS buffer rule	
(6)	Compliance with permit seems to be compliance with TMDL as WLAs are mostly existing permit conditions or restated WQS. WLAs do not seem to add value. Using shade as surrogate for parameters other than temperature		(100 ft rather than 75 ft.).	
(8)	creates holes. TMDL does not assess if current landuse practices, such as forestry,			
(9)	contribute to sediment impairments. Reasonable Assurance section is inconsistent. Should consider actions that are not already occurring. Deferring to Fish and Forest assurances is a problem.			
	TMDL cites nutrient hotspots and impacts but does not limit nutrients. TMDL advocates a 'we'll evaluate later' approach to septics and other nutrient sources. Better to wait until Budd Inlet and			
(11)	Capital Lake TMDL are complete. Maybe move forward with temperature segments only.			

